

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DISABILITY RIGHTS WASHINGTON,

No. _____

Plaintiff,

vs.

COMPLAINT

LINDA ROLFE, in her official capacity as
Director of Division of Developmental
Disabilities, and WASHINGTON DIVISION OF
DEVELOPMENTAL DISABILITIES,

Defendants.

COMES NOW the plaintiff by and through its attorney, and as for its cause of action
against the defendants, states and alleges as follows.

I. PRELIMINARY STATEMENT

1. This civil rights action seeks injunctive and declaratory relief to enjoin
Defendants Division of Developmental Disabilities (hereinafter DDD) and its Director, Linda
Rolfe, from restricting or interfering with full, complete, and meaningful access of Disability
Rights Washington to those individuals with disabilities in the State of Washington, or where
applicable, their legal guardians, who are denied or terminated from DDD services based upon
their disability. Such access is mandated by the Developmental Disabilities Assistance and Bill

1 of Rights Act (hereinafter the DD Act) of 1975, 42 U.S.C. §15041, *et seq.*, and the regulations
2 promulgated thereto and violation of this right to access information violates 42 U.S.C. § 1983.

3 **II. JURISDICTION AND VENUE**

4 2. This action arises under the laws of the United States. Plaintiff DRW seeks
5 declaratory and injunctive relief pursuant to, the DD Act, 42 U.S.C. §15041, the PAIMI Act, 42
6 U.S.C. § 10801, and the PAIR Act, 29 U.S.C. § 794e, to redress the interference, by Defendant,
7 in DRW's ability to carry out the function of the protection and advocacy system for Washington
8 State by denying DRW the access to individuals with mental illness, and their records that it
9 needs to conduct a full and meaningful investigation in to potential abuse and neglect.

10 3. Jurisdiction in this matter is asserted pursuant to 28 U.S.C. §§ 1331, 2201 for
11 causes of action arising under the Constitution and federal statutory and common laws of the
12 United States.

13 4. The rights which the plaintiff seeks to enforce are guaranteed by Congress
14 through the mandates set forth in the DD Act, 42 U.S.C. §15041, the PAIMI Act, 42 U.S.C. §
15 10801, and the PAIR Act, 29 U.S.C. § 794e. These Acts establish a mandate for DRW to protect
16 and advocate for individuals with developmental, mental, sensory, and physical disabilities who
17 have been abused, neglected, or had their rights otherwise violated.

18 5. This Honorable Court also has authority pursuant to 28 U.S.C. §§ 2201 and 2202
19 to enter declaratory judgments declaring the rights and other legal relations of parties to the
20 action.

21 6. An award of monetary damages is inadequate as plaintiff suffers and will continue
22 to suffer irreparable harm from defendants' actions, inactions, policies, and procedures and the
23 violations complained herein.

7. Venue is proper pursuant to 28 U.S.C. § 1391(b) as all parties reside in the State of Washington and Plaintiff's claim for relief arises within this state. Defendants performed the acts and omissions complained of herein in the State of Washington in this district. This District provides the most convenient forum for the litigation of these issues.

III. PARTIES

Plaintiff

Disability Rights Washington

8. Plaintiff DRW, a nonprofit corporation duly organized under the laws of the State of Washington, is the statewide protection and advocacy system designated by the Governor of the State of Washington to protect and advocate for the legal and civil rights of those citizens of this state who have disabilities, pursuant to the DD Act, 42 U.S.C. § 15041 *et seq.*, the PAIMI Act, 42 U.S.C. § 10801 *et seq.*, and the PAIR Act, 29 U.S.C. § 794e. R.C.W. 71A.10.080(2). DRW maintains its offices at 315 5th Avenue South, Suite 850, Seattle, Washington, 98104.

9. As the duly designated statewide protection and advocacy system for individuals with disabilities in the State of Washington, DRW has the authority and responsibility to pursue legal, administrative, and such other appropriate remedies or relief as may be necessary to protect and advocate for the rights of those persons within the State of Washington who are, or who may be eligible for treatment, services, or habilitation due to their physical and/or mental disabilities pursuant to the DD Act, 42 U.S.C. § 15043, the PAIMI Act, 42 U.S.C. § 108051, and the PAIR Act, 29 U.S.C. § 794e (f).

10. In its capacity as the designated protection and advocacy system for the State of Washington, DRW is entitled to access all persons with disabilities, individually or as a group,

1 receiving services in the State of Washington in order to adequately and meaningfully protect
2 their rights pursuant to federal and state statutes in regard thereto. 42 C.F.R. § 51.2

3 11. DRW has and will continue to suffer irreparable harm as a result of Defendants'
4 actions or inactions absent preliminary and permanent relief.

5 **Defendants**

6 **A. Division of Developmental Disabilities**

7 12. Defendant DDD is the Washington State agency designated to administer or
8 supervise the administration of services to individuals with intellectual disabilities. As such,
9 DDD administers federal and state funds in operating services in a way that ensures compliance
10 with state and federal constitutional and statutory protections for individuals with developmental
11 disabilities.

12 **B. DDD Director Linda Rolfe, in her official capacity**

13 13. Defendant Linda Rolfe is sued in her official capacity as Director of DDD.
14 Defendant Rolfe's administrative office is located in Olympia, Washington.

15 14. Defendant Rolfe, in her official capacity, has at all times relevant herein acted
16 under color of state law and has exercised general responsibility, supervision, and oversight of the
17 policies, practices, and operations of DDD. Defendant Rolfe's responsibilities include overseeing
18 staff responsible for disclosure of information maintained by or otherwise available to DDD.

19 **IV. FACTUAL ALLEGATIONS**

20 15. At all times relevant herein, Disability Rights Washington has been, and is,
21 designated by the Governor of the State of Washington as the protection and advocacy system
22 for those citizens of this state who have mental, developmental, and physical disabilities.
23

1 16. Disability Rights Washington, like each of the protection and advocacy agencies
2 currently operating in the other forty-nine states, the federal protectorates (American Samoa, the
3 Commonwealth of the North Mariana Islands, Guam, Puerto Rico, the Republic of Palau, and the
4 United States Virgin Islands), and the District of Columbia, operates under the mandates of the
5 DD Act, 42 U.S.C. § 15041 *et seq.*, the PAIMI Act, 42 U.S.C. § 10801 *et seq.*, and the PAIR
6 Act, 29 U.S.C. § 794e *et seq.*

7 17. As a result of the extensive congressional hearings preceding each of the aforesaid
8 statutory enactments, Congress found that there had been an extensive history of unlawful
9 discriminatory segregation, extraordinary maltreatment, financial exploitation, neglect, and
10 physical abuse of individuals with disabilities throughout the United States.

11 18. The federal laws that established the protection and advocacy systems were
12 created in direct response to the need for independent advocacy services for individuals with
13 disabilities who were not getting adequate services from state operated programs. *See e.g.*, 42
14 U.S.C. §10501 (11)-(12).

15 19. The Protection and Advocacy Acts (P&A Acts) require that each state, in
16 exchange for receipt of certain federal financial assistance, “effect a system to protect and
17 advocate for the rights of persons” with disabilities and further specify that these systems must
18 have the authority to investigate and pursue legal and other appropriate remedies for those
19 persons. The DD Act, 42 U.S.C. § 15041 *et seq.*, the PAIMI Act, 42 U.S.C. § 10801 *et seq.*, and
20 the PAIR Act, 29 U.S.C. § 794e *et seq.*

21 20. The Washington State legislature provided for such a system with the enactment
22 of R.C.W. 71A.10.080. Specifically, under the provisions of R.C.W. 71A.10.080(1), the
23 designated protection and advocacy agency “shall have the authority to pursue legal,

1 administrative, and other appropriate remedies to protect the rights of the developmentally
2 disabled, and to investigate allegations of abuse and neglect.”

3 21. Disability Rights Washington, in accordance with its congressional mandates,
4 duties, and responsibilities as the designated protection and advocacy agency for Washington,
5 employs attorneys and advocates to provide protection and advocacy services to people in
6 Washington who have mental, developmental, physical, and sensory disabilities.

7 22. Defendants administer Washington’s social service programs designed
8 specifically to meet the need of individuals with developmental disabilities.

9 23. Residents of Washington with developmental disabilities who seek to receive
10 services to meet their needs, must meet DDD’s eligibility criteria in order to receive services
11 administered by DDD.

12 24. Washington statute RCW 71A.10.020 (4) provides that eligibility for DDD
13 services can be established by showing an individual’s disability is caused by any number of
14 conditions, including:

- 15 • intellectual disability,
- 16 • cerebral palsy,
- 17 • epilepsy,
- 18 • autism, or
- 19 • another neurological condition, or
- 20 • other condition of an individual found by the secretary to be closely related to
- 21 an intellectual disability or to require treatment similar to that required for
- 22 individuals with intellectual disabilities.
- 23

1 25. Disability Rights Washington requested contact information for individuals who
2 have been or will be denied services or terminated from existing services under the final “other
3 conditions” eligibility category.

4 26. The reason for this request is that due to reports Disability Rights Washington has
5 received and information it has obtained it has probable cause to believe the last category listed,
6 “other conditions,” is now illusory for a vast number of individuals who were previously eligible.
7 These individuals are now prevented from showing they have a developmental disability because
8 they have a diagnosis which the DDD has disallowed coverage, but which nevertheless meets
9 state and federal statutory requirements. These individuals need the essential services they have
10 either requested or have been receiving for years from DDD. Such categorical exclusions
11 violate federal anti-discrimination laws and Medicaid.

12 27. DDD maintains a list of disabilities which are categorically excluded from being
13 considered under the “other conditions” eligibility category. The list was created by DDD’s
14 Other Conditions Determination Committee (hereinafter OCDC).

15 28. The committee’s measuring stick for an acceptable “other condition” is one in
16 which the specific diagnosis *by definition* results in intellectual and functional deficits similar to
17 the deficits identified for intellectual disability in each and every person who is diagnosed with
18 the condition in question. The condition is excluded if not every person with the condition has
19 the same level of disability as a person with intellectual disabilities.

20 29. With respect to such conditions in which not each and every person with the
21 condition is affected to the same sever degree, no one may use the diagnosis of that condition to
22 qualify for services, no matter how significant that individual’s intellectual and functional
23 deficits may be.

1 30. It is unlawful discrimination for the department to disregard the intellectual and
 2 functional deficits of all individuals with traumatic brain injuries, static encephalopathy, Prader-
 3 Willi syndrome, fetal alcohol spectrum disorder, and numerous other conditions that typically
 4 result in similar disabilities and support needs as those with intellectual disabilities.

5 31. DDD “may not, directly or through contractual or other arrangements, utilize
 6 criteria or methods of administration: ¶ (i) That have the effect of subjecting qualified individuals
 7 with disabilities to discrimination on the basis of disability; ¶ (ii) [or] That have the purpose or
 8 effect of defeating or substantially impairing accomplishment of the objectives of [DDD’s]
 9 program with respect to individuals with disabilities. . . .” 28 C.F.R. § 35.130(b)(3) (emphasis
 10 added); see also 28 C.F.R. § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(4) (Section 504).

11 32. The Other Conditions Determination Committee’s decision to categorically
 12 exclude people from consideration on the basis that in order to qualify for services you must
 13 have a disability which affects all people to the same significant level without assessing
 14 individual need is discriminatory on the basis of disability and impairs, if not completely defeats,
 15 DDD’s delivery of services to people who otherwise qualify for DDD programs.

16 33. DDD’s use of the OCDC’s exclusionary list also violates the federal Medicaid
 17 Act mandate that participating states provide Early and Periodic Screening Diagnostic and
 18 Treatment (EPSDT) services. Under EPSDT, the state must provide services necessary to
 19 correct or ameliorate the conditions of Medicaid coverable individuals under the age of 21,
 20 regardless of DDD eligibility. 42 U.S.C. § 1396d(r)(5).

21 34. DDD eligibility rules must be met to access all services administered by DDD
 22 including but not limited to Washington’s Intermediate Care Facilities (ICFs). RCW 71A.16.020.
 23

1 35. DDD eligibility rules must also be met to access Washington's DDD administered
2 Home and Community Bases Services (HCBS) waivers. WAC 388-845-0030.

3 36. Therefore, the OCDC's exclusion of various diagnoses also violates Medicaid
4 rules for ICFs and comparability. 42 U.S.C. § 1396d(d); 42 C.F.R. § 440.150 (a)(2); 42 C.F.R.
5 §440.230.

6 37. Similar to the Washington statute, Medicaid provides that if ICF services are
7 offered by a state, they must be provided to people with "related conditions".

8 38. Medicaid's regulatory guidance does not allow for categorical exclusions based
9 upon disability. 42 U.S.C. § 1396d(d); 42 C.F.R. § 440.150 (a)(2).

10 39. Medicaid requires that sufficient services be provided and that individuals not
11 experience discrimination based on diagnosis. 42 C.F.R. §440.230.

12 40. While Washington has a waiver of comparability in its HCBS waivers, the
13 categorical exclusions of the Other Conditions Determination Committee that have been
14 generated since 2010 go far beyond the scope of the comparability waiver requested in 2008.
15 HCBS Waiver Application version 3.3, Appendix B, a true and correct copy is attached as
16 Exhibit A.

17 41. Finally, the Affordable Care Act requires Maintenance of Effort which precludes
18 states from narrowing the eligibility for their HCBS and ICF programs. See August 5, 2011,
19 State Medicaid Director Letter, a true and correct copy is attached as Exhibit B.

20 42. Disability Rights Washington and others have pointed out to the department that
21 its repeated efforts to restrict access to services violate the Maintenance of Efforts requirement.
22 See November 4, 2009 letter from DRW to Janet Adams, DDD, a true and correct copy is
23

1 attached as Exhibit C; and March 24, 2009 letter from DRW, NJP, and CLS to DSHS rules
2 coordinator, a true and correct copy is attached as Exhibit D.

3 43. Repeated and/or egregious rights violations constitute abuse under the P&A Acts.
4 62 FR 53548, 53551.

5 44. Failure to provide necessary services when legally required to do so constitutes
6 neglect under the P&A Acts. 45 C.F.R. § 1386.19.

7 45. In light of the repeated and egregious potential violations of legal rights by
8 Defendants and the likelihood of extreme irreparable harm experienced by applicants when
9 Defendants withhold necessary services, Disability Rights Washington determined it had
10 probable cause to suspect possible abuse and neglect of individuals with developmental
11 disabilities affected by Defendants' categorical exclusions.

12 46. Disability Rights Washington is the final arbiter of what constitutes probable
13 cause for the purposes of initiating an abuse and neglect investigation.

14 47. On December 21, 2011, Disability Rights Washington requested the names and
15 contact of individuals affected by Defendants' categorical exclusion based upon diagnosis.
16 Disability Rights Washington also requested the name and contact information of any guardians
17 for those individuals. This written request for access cited legal authority. The letter included
18 specific support for the release of names and contact information for individuals with whom the
19 protection and advocacy system was not yet in direct contact, but who are affected by abusive or
20 neglectful policies or practices. A true and correct copy is attached as Exhibit E.

21 48. On December 23, 2011, Defendants wrote to indicate they were denying
22 Disability Rights Washington's request. A true and correct copy is attached as Exhibit F. The
23 denial of access provided three rationales:

1 49. DDD asserts that the access agreement between Disability Rights Washington and
 2 DDD prevents the department from disclosing the names of individuals who are not current
 3 DDD clients.

4 50. DDD asserts that the access authority provided by the DD Acts is limited to
 5 individuals with which Disability Rights Washington has a relationship

6 51. DDD asserts that it is not required to provide information about individuals who
 7 will be terminated in their next review, because the department believes the likelihood for
 8 termination is speculative and thus the request is premature.

9 52. On December 27, 2011, Disability Rights Washington provided a written reply to
 10 each of DDD's reasons for not providing the requested names and contact information. A true
 11 and correct copy is attached as Exhibit G.

12 53. First, Disability Rights Washington pointed out to DDD that the agreement
 13 referenced in DDD's letter is merely intended to operationalize the provisions of the DD Act.
 14 The agreement itself acknowledges that it does not limit the authority and obligations generated
 15 by the Act in any way. Access Agreement Between WPAS¹ and DDD § I.B.

16 54. Nowhere does federal law limit the duty of disclosure of information to entities
 17 currently serving the individual.

18 55. Second, in both its December 21st and 27th letters, Disability Rights Washington
 19 explained to DDD that its access authority is not limited to individuals with which it has
 20 established a relationship. Disability Rights Washington provided DDD with recent ninth circuit
 21

22
 23 ¹ Disability Rights Washington was formerly known as Washington Protection and Advocacy System. This agreement was entered into prior to that name change and therefore the agreement references Plaintiff under its old acronym, WPAS.

1 case law, directly on point, as well as federal regulatory guidance to support its request. *See*
2 Exhibits E and G, citing *Disability Law Center of Alaska, Inc. v. Anchorage School Dist.*, 581
3 F.3d 936 (9th Cir. 2009) (holding P&A Acts authorize access to otherwise confidential
4 information indentifying people with disabilities and their guardians); *see also* 42 C.F.R. §
5 51.43; 45 C.F.R. § 1386.22(i).

6 56. Defendants failed to provide any support for its narrow reading of the P&A Acts,
7 which they incorrectly assert limit protection and advocacy systems to investigating abuse and
8 neglect of only identified individuals.

9 57. Third, Disability Rights Washington does not consider the harm current DDD
10 clients will sufferer from termination of their necessary Medicaid services to be merely
11 speculative. The unfortunate reality is that due to DDD's categorical exclusion of certain
12 diagnoses under the other conditions criteria, there is nothing speculative about individuals being
13 terminated as a result of their particular diagnosis.

14 58. The department maintains a list of diagnoses that are excluded from consideration
15 for the purposes of qualifying under the other condition category. With respect to future
16 terminations, Disability Rights Washington has requested the names and contact information of
17 only those individuals who previously used one of the now disqualified diagnoses to be found
18 eligible in the past, as these individuals will be terminated if they are ever reassessed.

19 59. Each of these individuals will be terminated at some point.

20 60. Once again, DDD provided no legal authority for the limitation it has read into the
21 P&A Acts.

22 61. On December 28, 2011 DDD mailed a letter to Disability Rights Washington,
23 which was received on January 3, 2012. A true and correct copy is attached as Exhibit H. The

1 letter stated that since it did not consider Disability Rights Washington's request to be
2 appropriate under the protection and advocacy Acts, DDD was going to treat the request as a
3 request under the Washington State Public Records Act. In this letter, DDD went on to deny
4 Disability Rights Washington's request under state law.

5 62. On December 27th, Disability Rights Washington reiterated its request for the
6 names and contact information of individuals affected by the categorical exclusions.

7 63. Despite the federal statutes which provides Disability Rights Washington access
8 to the requested information within three business days from the initial written request, Disability
9 Rights Washington granted Defendants an additional three days to provide the information.
10 Defendants did not provide the requested names and contact information or any legal authority
11 for its continued denial of access to the information.

12 64. As a result of Defendants' refusal to follow federal law, DRW has been denied
13 access to conduct a full and meaningful investigation and has been unable to fulfill its federal
14 mandate to investigate possible abuse and neglect of individuals with developmental disabilities.

15 65. Defendants have been made aware of Disability Rights Washington's federal
16 authority to obtain a list of names and contact information for a group of individuals and their
17 guardians, when Disability Rights Washington has determined there is probable cause to suspect
18 possible abuse or neglect of that group of individuals.

19 66. Defendants' acts frustrate the congressionally mandated functions and duties of
20 the protection and advocacy system. As described in the foregoing paragraphs, Plaintiff
21 attempted, on multiple occasions, to resolve its access issue with the Defendants. These attempts
22 have proven unsuccessful.
23

1 D. For an Order directing Defendant to adhere to the P&A Acts in responding
2 to Disability Rights Washington's access requests;

3 E. For an Order directing Defendant to pay Plaintiff's reasonable attorney
4 fees and costs associated with enforcing Plaintiff's rights in this action; and

5 F. For an Order granting Plaintiff such other and further relief as this Court
6 deems just and proper.

7 Dated this 5th day of January, 2011.

8 Respectfully Submitted,

9 DISABILITY RIGHTS WASHINGTON

10 By: s/David Carlson

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